BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
Amendment of Rules and Policies Governing Pole Attachments	)	CS Docket No. 97-98

COMMENTS OF
TELE-COMMUNICATIONS, INC.

Brian Conboy
Michael G. Jones
Gunnar D. Halley

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

Its Attorneys

June 27, 1997

TABLE OF CONTENTS

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Amendment of Rules and Policies Governing Pole Attachments	)	CS Docket No. 97-98
	)	

COMMENTS OF
TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI") hereby submits its comments in the above-captioned proceeding.

I. INTRODUCTION

In this proceeding, the Commission considers adjustment to the component elements of rates for attachments to poles, ducts, conduits, and rights-of-way owned or controlled by utilities. TCI urges the Commission to: (1) fashion rules to secure access to poles, ducts, conduits, and rights-of-way on a just, reasonable, and nondiscriminatory basis, and (2) ensure that poles, ducts, conduits, and rights-of-way, as essential facilities, are priced on a cost-basis. To this end, the Commission should adopt the following specific rules and policies:

- To diminish the potential for anticompetitive behavior, the Commission should not grant utilities excessive discretion for determining the reasonableness of access terms, conditions, and rates. Instead, the Commission should implement specific and pro-competitive pricing and

access rules, while encouraging parties to reach negotiated settlements of disputes.

- The Commission should adjust pole attachment rate formulae to include a negative return carrying charge in rates when net pole investment is negative.

- The Commission should exclude income taxes from the pole attachment rate calculation when net pole investment is negative.

- Duct and conduit rates should be calculated using the same approach used for pole attachment rates. Nevertheless, the Commission should consider the cost advantages of up-front capacity expansion in ducts and conduit.

- The Commission should permit cable operators to treat pole attachment rate increases as external for the purpose of cable rate regulation.

- The Commission should take affirmative steps to promote sharing of pole, duct, and conduit construction costs among parties.

II. THE ESSENTIAL NATURE OF UTILITY POLE FACILITIES SHOULD DRIVE THE COMMISSION'S REFORMATION OF POLE ATTACHMENT RATES.

The Commission's resolution of the specific issues raised in the Notice[1] must be informed by the broad policy goals of pole attachment rate regulation. Specifically, in this proceeding, the Commission must determine whether Section 224 envisions the assessment of pole attachment rates as a means of compensating utilities for their costs ("cost theory"), including a reasonable return on their investment, or as a means of extracting from attaching entities a sum that seeks to approximate the benefits

---

1 Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, *Notice of Proposed Rulemaking*, FCC 97-94 (rel. March 14, 1997) ("Notice").

they receive from their attachments ("benefit theory"). Only by first resolving this issue can the Commission achieve a non-arbitrary, rational, and coherent pole attachment rate structure.

In the 1996 Act, Congress made a landmark commitment to the development of telecommunications competition.[2] In doing so, it vested in the Commission the principal responsibility for fostering competition. Congress recognized the historical monopoly benefits enjoyed by incumbent utilities and sought to diffuse those elements of monopoly control which could thwart competitive development. In so doing, Congress reaffirmed and expanded its commitment to granting access to poles, ducts, conduits, and rights-of-way.[3] Significantly, access must be furnished at just and reasonable rates.[4] While the statute provides the formula for determining the meaning of "just and reasonable," the Commission must establish the appropriate formulae for calculating the component elements. The Commission must be guided by the goals of the Act in executing this responsibility.

Most importantly, poles, ducts, conduits, and rights-of-way are essential facilities and this historical fact should inform the Commission's approach to pole attachment rate regulation.[5]

---

2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

3 See 47 U.S.C. § 224.

4 See 47 U.S.C. § 224(b)(1).

5 On several occasions, the Commission has characterized utility pole and conduit facilities as "bottlenecks" or

The duplication of utility pole and conduit networks is an economically infeasible enterprise. Moreover, attempts to construct or acquire new poles, conduit, ducts, and rights-of-way are impeded or prevented not only by economic barriers, but also by State and local government regulation.[6] For various reasons, many State and local governments now limit the ability of cable

---

"essential facilities." See, e.g., Teleport Communications - New York, File No. 13135-CF-TC-(3)-92, *Memorandum Opinion and Order*, 7 FCC Rcd 5986, 5987-88 at ¶ 15 (1992)(cable/telco cross-ownership rules were "based on the judgment that cable television companies could be prevented from fair access to poles and conduits they needed to bring service to consumers by telephone companies which had monopoly control of these bottleneck facilities"); see also Telephone Company - Cable Television Cross-Ownership Rules, CC Docket No. 87-266, *Further Notice of Inquiry and Notice of Proposed Rulemaking*, 3 FCC Rcd 5849, 5862 at ¶ 69 (1988)(noting that IXCs "do not control poles and conduit that would be used by cable operators for provision of cable television service and therefore do not have the ability to exercise anticompetitive power in terms of bottleneck access control against independent providers of service"); see also Cross-Ownership Rules, CC Docket No. 78-219, *Clarification and Notice of Proposed Rulemaking*, 69 FCC 2d 1097, 1112 at ¶ 24 (1978)(stating the belief that no additional pole attachment requirements were needed "in light of telephone companies' obligations under the antitrust laws to make essential facilities available under reasonable terms and conditions"); see also Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, CS Docket No. 94-48, *First Report*, 9 FCC Rcd 7442, 7555 at ¶ 243 (1994)("concerns have recently reemerged with respect to utility poles as a potential bottleneck where cable operators themselves might be suffering competitive harm").

6 See, e.g., Federal Preemption of Moratoria Regulation Imposed by State and Local Governments On Siting of Telecommunications Facilities, DA 96-2140, *Petition for Declaratory Ruling of the Cellular Telecommunications Industry Association* (filed Dec. 16, 1996) (documenting over 110 State and local moratoria on telecommunications facility siting).

operators and telecommunications carriers to obtain rights-of-way or construct transmission facilities that duplicate existing utility facilities. As a result, the number of transmission routes and facilities remains small and relatively finite. For these reasons, poles, ducts, conduits, and rights-of-way are essential facilities and their access rates should be established accordingly.[7]

Regulation of rates for access to essential facilities are based upon cost. That is, regulatory authorities aim to ensure the compensation of the owner or controller of essential facilities for the costs incurred from the use of the facilities while preventing the owner or controller from extracting monopoly rents. The 1996 Act provides several recent examples of the philosophy that access to bottleneck facilities should be provided at reasonable, non-discriminatory rates. For example, Congress mandated access to essential local network facilities of the Bell Operating Companies at cost-based rates.[8] Similarly,

---

[7] The court in MCI v. AT&T succinctly stated the four elements necessary to establish liability under the essential facilities doctrine: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-1133 (7th Cir. 1983), cert. denied, 464 U.S. 891 (1983).

[8] See 47 U.S.C. §§ 251, 252.

Congress extended the benefits of access and reasonable rates of Section 224 to telecommunications carriers.[9]

The focus of regulating the rates for access to essential facilities has always been and must continue to be the compensation of the owner or controller of the essential facility for the costs of providing access.[10] The Commission should clearly reaffirm this policy goal as it considers revisions to the rate levels and structures under Section 224.[11]

III. THE COMMISSION SHOULD NOT DEFER OVERARCHING POLE ATTACHMENT RATE ISSUES TO PRIVATE NEGOTIATIONS BECAUSE DOING SO WOULD FACILITATE THE MAINTENANCE OF BARRIERS TO ENTRY.

The rates for access to poles, ducts, conduit, and rights-of-way is a critical issue because, as noted, such access is essential to new entry. Even "reasonable" pole attachment rates can amount to enormous sums. Carriers necessarily must incur these costs prior to generating revenue from the consumer. A competitive carrier's costs of doing business may increase to exorbitant levels, potentially foreclosing market entry, if

---

9 See 47 U.S.C. § 224(f)(1).

10 Because of the importance of essential facilities to attaching parties, were access priced on the basis of the benefit conferred to the party granted access, the resulting rates would be so high as to preclude competitive activity.

11 See General Telephone Co. of Southwest v. U.S., 449 F.2d 846, 857 (5th Cir. 1971)(it is proper for the Commission to consider antitrust issues when fulfilling its public interest obligations under the Communications Act); see id. at 858 ("not only is the Commission permitted to consider the anticompetitive potential of activities which fall within the purview of its jurisdiction, but . . . in some instances it is obliged to consider them")(emphasis added).

unreasonable rates or conditions for access to these essential facilities is permitted. Hence, just and reasonable rates and access to poles, ducts, conduit, and rights-of-way will be crucial to the realization of competitive markets.

As they begin to offer telecommunications services, video services, and, particularly in the case of electric utilities, transmission capacity, utilities will have an interest in preventing or delaying access to poles by competitors, or in raising rivals' costs through pole attachment rate inflation.[12] The Commission has observed that "a utility that itself is engaged in video programming or telecommunications services has the ability and the incentive to use its control over distribution facilities to its own competitive advantage."[13] The

---

12 Because of their control of essential facilities, utilities possess the ability to inflict harm not only on competitors, but also on consumers. By raising its competitors' costs, a utility diminishes consumer welfare by restricting output (due to those competitors that must leave the market due to the price squeeze), and by raising end user rates of those competitors willing to pay unreasonable pole attachment rates. In the end, consumers suffer both fewer choices and higher prices (transferred to utilities in the form of monopoly rents). See, e.g., Thomas G. Krattenmaker and Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 Yale L.J. 209, 279 (1986)(discussing the consumer welfare sought to be protected by antitrust law).

13 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, 16071 at ¶ 1150 (1996)("Local Competition Order"). Two utilities recently announced their intention to join forces with AT&T to offer a combination of utility and telecommunications services. See Benjamin A. Holden, *UtiliCorp and Peco, Aided by AT&T, To Launch One-Stop Utility Service*, WALL ST. J., June 24, 1997, at A3.

Commission should adopt rules in this proceeding to prevent utilities from acting on these unwholesome incentives in a way that diminishes competitive activity.

Moreover, as the Commission observed, unwholesome incentives are only part of the problem. Absent Commission intervention, utilities also retain the ability to execute anticompetitive pricing and access strategies by virtue of their bottleneck facility control. The incumbent utilities' ability to realize anticompetitive goals comprises a formidable threat to competition and consumer welfare which no single carrier can reasonably expect to overcome.[14] The Commission's intervention in and oversight of this process is essential.

The utilities understand that Commission intervention would diminish their ability to act on anticompetitive incentives. Thus, an association of utilities recently submitted to the Commission a White Paper[15] which repeatedly emphasized the notion

---

14 In a recent filing with the Commission, the Michigan Cable Telecommunications Association cites to a Troy, Michigan City Councilman's belief that one city could not fight Ameritech alone in an attempt to stop preferential access by Ameritech to rights-of-way. See Application by Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, *Comments of the Michigan Cable Telecommunications Association*, at 23 (filed June 9, 1997).

15 "Just and Reasonable Rates and Charges for Pole Attachments: the Utility Perspective," presented by American Electric Power Service Corp., Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power & Light Company, Northern States Power Company, The Southern Company, and Washington Water Power Company (filed Aug. 28, 1996) ("White Paper").

that the Commission should rely on voluntary negotiations between parties for reaching pole attachment agreements.[16]

The central issues in the Notice cannot be left to negotiations alone: a clear baseline for determining the reasonableness of rates and conditions must preexist. TCI does not suggest that the Commission enumerate the particular details and minute requirements for application to all pole attachment agreements. Negotiations between the parties should accomplish those functions. However, total reliance upon private negotiations for the resolution of pole attachment rate issues, without any guidance or principles established by the Commission, will grant utilities excessive levels of discretion to fashion attachment rates that will substantially harm competitors and potential competitors, as well as their customers.[17] If left unchecked, such exercise of utility discretion would invite the erection of barriers to entry.[18] To avoid the attending injury

---

16 See White Paper at 3-4.

17 See, e.g., Letter from Meredith J. Jones, Chief, Cable Services Bureau, Federal Communications Commission to Danny E. Adams, Kelley Drye & Warren LLP, DA 97-131, at 2 (Jan. 17, 1997)("Section 224, as originally enacted and as amended, acknowledges that parties in a pole attachment relationship do not have equal bargaining positions, and that the potential for barriers to competitive entry emanating from the lack of access or unreasonable rates is significant").

18 See "Common Carrier Bureau Cautions Owners of Utility Poles," DA 95-35, *Public Notice* (rel. Jan. 11, 1995)(observing that "[u]tility poles, ducts, and conduits are regarded as essential facilities" and, after noting allegations of utilities' anticompetitive acts, affirming the Bureau's "commitment to ensuring that the growth and development of cable television facilities is not hindered

to competitive development, the Commission must enunciate and enforce strong, threshold principles within the boundaries of which parties can negotiate the specific terms for pole attachments. Moreover, by defining clearly the component elements of the rate formulae, the Commission will facilitate private agreements between parties without the need for recourse through the pole attachment complaint process. These principles are discussed in the following section.

IV. THE COMMISSION SHOULD ADOPT THRESHOLD PRINCIPLES FOR RESOLUTION OF RATE ISSUES.

A. THE COMMISSION SHOULD MANDATE COST-BASED RATES FOR POLES, DUCTS, CONDUITS, AND RIGHTS-OF-WAY.

Cable operators should be treated like other customers of the utility. That is, the rates they pay for pole attachments should be based upon the direct cost of the assets used.[19] Access to poles, ducts, conduit, and rights-of-way must not be converted into a source of monopoly rents for utilities. Through Section 224 and the general competitive philosophy of the 1996 Act, Congress recognized the historical right-of-way benefits conferred upon utilities. Looking forward to a competitive model, Congress intended that utilities, because they rely on

---

by unreasonable conduct on the part of utility pole owners").

19 In floor debate of the 1996 Act, Senator Brown explained that the bill required the provision of access "on a cost basis" and he could "understand requiring the incumbent monopoly to provide access on a cost basis, since the captured rate payers funded the construction." 141 CONG. REC. S8468 (1995) (emphasis added).

historical privilege, serve the common good on a just and reasonable basis and that their historical competitive advantages should no longer be perpetual.

Thus, a cost-based approach to pole attachment rates should be adopted. The Commission should utilize direct costs calculated according to State Public Utility Commission ("PUC") rules in setting rates, rather than attempting to define a national blend of these methods. The resulting costs can be inserted into the Commission's pole attachment formulae to arrive at just and reasonable rates.

For example, without parameters, utilities have dual rent-maximization incentives to exaggerate the height of poles. First, capacity expansion will impose harm on actual or potential competitors. A taller pole involves greater capital expenses, a portion of which is recoverable from attaching entities through the Commission's pole attachment rate formula.[20] Assume that a utility increases the height of a pole from 30 feet to 40 feet. Even if a cable operator has no need for an additional ten feet on the pole, the Commission's proposed formula will assess the cable operator a portion of the capital expenses for that ten feet. Second, the capacity expansion also increases revenues for the utility's core service. The cable operator is forced to subsidize pole attachment capacity expansion even if this additional ten feet is used to carry electric feeder and

---

20 See 47 U.S.C. § 224(d)(1).

distribution cables.[21] The Commission should establish clear parameters to minimize disagreement among parties and to discourage anticompetitive behavior.

In recognition of the importance of pole height to pole attachment rates, the Notice seeks comment on the applicability of its current pole height presumptions.[22] It refers to the White Paper which supports the use of average pole heights for calculating pole attachment rates.[23] The White Paper recommends the use of 40 feet as an average pole height, claiming that pole heights have increased over time to accommodate increased demand for pole space.[24]

TCI supports the use of reasonable presumptions, but not the exclusion of 30-foot poles from the rate calculations. Pole height increases may, in fact, result from increased demand but this demand originates from the utilities' core business. The White Paper makes no concession to the possibility that pole height increases result from utility upgrades or other increases

---

21 This result violates the Commission's Local Competition Order which states that the "modification costs [of adding capacity] will be borne only by the parties directly benefitting [sic] from the modification." Local Competition Order at ¶ 1162 (emphasis added)(citations omitted).

22 See Notice at ¶ 18.

23 See id.; see also White Paper at 10.

24 See White Paper at 10. The White Paper asserts that pole heights have increased. Yet, curiously, it also claims that utilities do not maintain pole-by-pole pole height information. See id. at 6. Prudence compels the Commission to inquire as to the factual basis for the White Paper's assertions before relying on its "data."

in utility demands of their facilities. Exclusion of 30-foot poles from the calculus ignores the substantial continued attachments to 30-foot poles and forces attaching entities to subsidize electric transmission facility upgrades or utility feeder lines.

The usable space presumption should also be informed by the changes to the National Electrical Safety Code ("NESC") ground clearance standards. At the time of the Second Report and Order, the NESC required 18 feet of ground clearance.[25] However, in 1990, the NESC was revised to reduce the ground clearance requirement to 15 1/2 feet.[26] The utility assertions of increasing pole heights and the changes to the NESC compel a conclusion that usable space on poles has increased significantly.

The Commission should also determine the presumptively reasonable amount of occupied space attributable to cable operator attachments. Consistent with the Commission's Second Report and Order, it should continue to be presumed that cable operators occupy one foot of space on a pole, without attribution of any safety space to cable attachments.[27] Nothing in the

---

25 See Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, *Memorandum Opinion and Second Report and Order*, 72 FCC 2d 59, 69-70 at ¶ 22 (1979) ("Second Report and Order").

26 See 1993 National Electrical Safety Code, Institute of Electrical and Electronics Engineers, Inc. at Table 232-1 (1993).

27 See Second Report and Order at ¶ 24.

nature of cable attachments changes the amount of space they occupy on poles, and the White Paper does not dispute this fact.

Instead, the White Paper erroneously contends that "all attaching entities [must] share in the costs of the nonusable space" on a pole.[28] Section 224(d) is unambiguously the relevant subsection for calculating cable operator pole attachment rates.[29] Subsection (d) contains no mention of assessing charges for nonusable space. Section 224(e) is unambiguously the relevant subsection for calculating telecommunications carrier pole attachment rates.[30] Subsection (e)(2) discusses charges for nonusable space. It does not mention application of nonusable space charges to cable operators. The Commission should clarify that utility assessment of nonusable space charges on cable operator attachments violates the Act.

Finally, pursuant to their jurisdiction over intrastate utility rates, State PUCs use their rules to calculate embedded costs in establishing utility rates. The Commission should not abandon the cost-basis of essential facility ratemaking by establishing a national blend of State PUC rules. Rather, it should use a utility's cost calculations made according to each

---

28 White Paper at 11.

29 See 47 U.S.C. § 224(d)(3) ("This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service").

30 See 47 U.S.C. § 224(e)(1) (directing the Commission to prescribe regulations to govern charges for pole attachments of telecommunications carriers in accordance with the provisions of subsection (e)).

State PUC's rules for a particular utility's facility costs. These costs can be used to derive just and reasonable pole attachment rates under the federal formulae.

B. RATES FOR ACCESS TO DUCTS AND CONDUIT SHOULD BE CALCULATED IN THE SAME MANNER AS RATES FOR ACCESS TO POLES.

TCI recognizes the significant cost differences between conduit and duct capacity expansion and pole capacity expansion. The expansion of conduit and duct capacity upon initial installation enjoys low incremental costs per unit of expansion relative to the incremental costs of adding capacity after initial installation. The added costs of subsequent duct and conduit capacity expansion result from, inter alia, the need to excavate streets, the extended time required to access conduit and ducts, and the added safety precautions necessary for underground work.[31]

Nonetheless, the Commission's approach to establishing conduit and duct attachment rate formulae should conform to the approach used for pole attachments. Specifically, the Commission should establish presumptively reasonable capacity parameters and cable occupancy percentages. Direct costs, as calculated according to State PUC rules, should be used to complete the formulae to arrive at just and reasonable conduit and duct rates.

---

31 See, e.g., Local Competition Order at ¶ 1163 (noting that "[e]xpansion of underground conduit space entails a very complicated procedure, given the heightened safety and reliability concerns associated with such facilities").

The Notice proposes to adopt the half-duct conduit methodology used by the Massachusetts DPU to establish just and reasonable rates for access to utility ducts.[32] Under this formula, it is presumed that a cable operator occupies one half duct and so should be charged only for the use of a half duct.[33] However, determinations by other State PUCs suggest that the half duct presumption in the Massachusetts formula may chronically overallocate duct space to attaching entities.[34] Consequently, the Notice's proposal may impose on attaching entities rates for access to duct and conduit space that exceed the costs associated with the provision of such access. An excessive conduit and duct attachment rate would violate the principle of essential facility pricing discussed in Section II, supra. Therefore, before adopting the Massachusetts formula, the Commission should inquire further to ensure that doing so would not unnecessarily burden cable operators and telecommunications carriers with excessive rates. TCI recommends the use of a 1/4-duct conduit presumption. The 1/4-duct presumption would account for the small portion of

---

32 See Notice at ¶ 46.

33 See id. at ¶ 44.

34 For example, the Oklahoma Corporation Commission has ruled that Southwestern Bell's inner duct rates should be set at 1/3 the full duct rate. See Application of AT&T Communications of the Southwest, Inc. for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company Pursuant to § 252(b) of the Telecommunications Act of 1996, Cause No. PUD960000218, Order No. 407704 at 14 (Okla. Corp. Comm'n, Nov. 13, 1996) (mimeo).

duct capacity occupied by high-capacity fiber-optic cables and the actual practice of duct subdivision into inner ducts.

Moreover, the proposed Massachusetts formula would charge attaching entities for reserved duct space if the attaching entity has the right to use the space for cable repair or "benefits in any way" from the reservation of space.[35] The "benefits in any way" language invites anticompetitive behavior. TCI agrees that attaching entities would enjoy benefits from the reservation of space for repair if they were granted access to such space when needed. Further, if an attaching entity requests the reservation of duct space for its own future needs, it would be reasonable to assess charges for the reserved space. However, the Notice implicitly considers non-repair-related benefits which attaching entities would enjoy from the reservation of duct space.[36] Before assessing cable operators a portion of the cost of repair space, utilities must demonstrate the actual availability to cable operators of the repair space. Moreover, the Commission should specify what benefits, other than access for repair, that an attaching entity would enjoy from reservation of space not otherwise requested by the attaching entity.

Failure to specify legitimate benefits for which charges may be assessed will encourage utilities to conceive of fictional or attenuated benefits for which they can mandate payments. As

---

35 See Notice at ¶ 45.

36 See id.

noted, utilities intending to offer services that compete with cable operators or telecommunications carriers have an incentive to minimize access to their transmission facilities (or to raise rivals' costs) as a means of erecting barriers to entry. Moreover, even utilities that do not intend to compete with cable operators and telecommunications carriers retain the incentive to assess reserved space charges wherever possible to maximize revenues. Because poles, ducts, conduit, and rights-of-way are bottleneck facilities, the market will "bear" unreasonable rates by necessity. As explained above, it is for this reason that the Commission must exercise control and surveillance over pole attachment rate levels. Absent defined limits on what constitutes a legitimate benefit enjoyed by attaching entities for the reservation of space, attaching entities will be forced to pay for unused duct space from which they enjoy no real or tangible benefit.

C. POLE ATTACHMENT RATE INCREASES RESULTING FROM MODIFICATIONS TO THE MAXIMUM RATE FORMULA ADOPTED IN THIS PROCEEDING SHOULD BE TREATED AS EXTERNAL FOR THE PURPOSE OF THE CABLE RATE REGULATIONS.

In the Notice, the Commission proposed a variety of modifications to the maximum rate formula, many of which, if adopted, would result in pole attachment rate increases. To the extent that such modifications increase pole attachment fees, the Commission should allow cable operators to pass these increases on to subscribers external from the price cap.

TCI acknowledges that the Commission previously has determined that pole attachment fees are not sufficiently unique

to warrant external treatment under the rate rules.[37] TCI disagrees with this conclusion and believes that this proceeding provides an important opportunity for the Commission to revisit the treatment of pole attachment fees under the cable rate regulations.[38]

Moreover, pole attachment fees are unique among the costs of providing cable service, and therefore suitable for external treatment, because attachment rights are essential and irreplaceable. To provide its service, a cable operator must be able to attach its facilities to poles and/or conduit. Bounded only by the maximum rate formula, fee increases imposed by the utility must be accepted by the cable operator if it is to continue providing its service. There simply is no substitute. The Commission deemed external treatment appropriate for taxes and franchise fees because "[t]hese costs are largely beyond the control of the cable operator."[39] Like taxes and franchise fees,

---

37 See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119, 4206 at ¶ 182 (1994)("Second Rate Reconsideration Order"); see also 47 C.F.R. § 76.922(f)(1) (does not include pole attachment fee increases among those cost increases which may be passed through to subscribers external from the rate regulations).

38 If the Commission is disinclined to consider the external treatment issue in this proceeding, TCI strongly encourages the Commission to commence a separate rulemaking proceeding to consider the external rate treatment of pole attachment rates for cable operators.

39 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation, MM

cable operators have no control and little influence over pole attachment fee increases that are consistent with the statute.[40] In these circumstances, external treatment of pole attachment fee increases as a general matter is warranted.

Notwithstanding the general regulatory treatment of pole attachment fee increases, any increase resulting from this proceeding should be treated externally. Several of the proposals set forth in the Notice, if adopted,[41] will promote pole attachment rate increases. Because such rate increases would exceed the maximum rate permitted under the current formula, they will be the direct result of the Commission's action in this proceeding. As the result of government action, such fee increases should be treated externally under the cable price cap rules consistent with the Commission's statements in the Second Order on Reconsideration. Thus, on a going forward basis, cable operators should be allowed to pass through to subscribers any increase in pole attachment fees exceeding the maximum rate that could be charged under the present formula.[42]

Docket No. 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5789 at ¶ 254 (1993).

40 The Cable Services Bureau recently recognized the unequal bargaining position (or lack of control) of cable operators in pole attachment negotiations. See n.17, supra.

41 As noted herein, TCI believes that these modifications are not warranted.

42 Section 224(e)(4) provides for a phase-in of increases in pole attachment rates for telecommunications carriers. The phase-in allowance constitutes an implicit recognition of the potentially severe effects that pole attachment rate increases can have on an attaching entity. This recognition

V. THE COMMISSION SHOULD ADJUST POLE ATTACHMENT RATE FORMULAE TO ACCOUNT FOR NEGATIVE NET POLE INVESTMENT.

A. THE COMMISSION'S NEGATIVE RETURN CARRYING CHARGE PROPOSAL RECOGNIZES THE COST-FREE LOAN MADE TO UTILITIES BY ATTACHING PARTIES.

In 1994, Southwestern Bell Telephone Company ("SWBT") filed a Petition for Clarification seeking Commission authorization to remove net salvage from the depreciation reserve component for the purpose of calculating the cost of a bare pole.[43] SWBT asserted that, in some circumstances due to the high cost of removal embedded in the salvage calculation, salvage caused net pole investment to be a negative figure even though the poles had not been fully depreciated.[44] Because the Commission's maximum pole attachment rate is based on a carrying charge applied to net pole investment, SWBT asserted that the negative investment created a negative rate.[45] In the Notice, the Commission tentatively concluded that it should adjust net salvage from the accumulated depreciation balance when it becomes negative, but only for the purpose of calculating certain components of the pole rate.[46]

---

should promote the external treatment of pole attachment rate increases for cable operators.

43 Computation of Rates for Attachment of Cable Television Hardware to Utility Poles, AAD 94-125, *Petition for Clarification, or in the Alternative, a Waiver of Southwestern Bell Telephone Company* (filed Aug. 26, 1994) ("SWBT Petition").

44 See id. at 1.

45 See id. at 2.

46 See Notice at ¶¶ 23-24.

Negative net pole investment can only occur when capital recovery exceeds the original cost of the poles. Cost-based ratemaking principles require that return on investment cease when capital recovery is complete.[47] When net pole investment becomes less than zero, it is because removal costs have been collected from telephone customers and attaching parties in advance of being incurred. The funds provided by this advance collection constitute a cost-free loan. Cost-based ratemaking principles require that cost-free loans be deducted from the investment base to which a rate of return, or investment carrying charge, is applied. The Commission's tentative conclusion that negative return should be included in the pole attachment rate[48] acknowledges the cost-free nature of the funds collected for pole removal and should be adopted.

B. THE COMMISSION SHOULD EXCLUDE INCOME TAXES WHEN NET POLE INVESTMENT IS NEGATIVE.

The Commission tentatively concludes that income taxes should be excluded from the pole rate calculation when investment is negative.[49] TCI concurs in the Commission's tentative

---

47 The fact that the over-recovery occurred because the depreciation rate included removal costs is irrelevant. Although the company may be entitled to continue recording depreciation expense until removal costs have been completely recovered, the fact remains that the total amount recovered exceeds the total amount invested. Lacking any unrecovered investment, the company is not entitled to collect return.

48 See Notice at ¶ 26.

49 See id. at ¶ 27.

conclusion. Income tax expense, which is generated by taxable return on net pole investment, ceases to be positive when the pole investment is fully recovered. As long as the income tax component of the maximum rate formula is based on book income tax expense, the formula should exclude income tax from the rate formula when net pole investment is negative.

VI. THE COMMISSION SHOULD PROMOTE AND FACILITATE SHARING OF POLE AND CONDUIT CONSTRUCTION COSTS AS AN ALTERNATIVE TO POLE ATTACHMENT FEES.

The 1996 Act amended section 224 of the Act to add several subsections requiring, inter alia, that utilities provide cable operators and telecommunications carriers nondiscriminatory access to poles, conduit, ducts, and rights-of-way,[50] and that the owner of the pole impute to its costs of providing telecommunications and cable services an amount equal to the applicable pole attachment rate.[51] These provisions clearly indicate Congress' intent to eliminate the use of these essential facilities as a competitive bludgeon by the party owning the facility. In other words, Congress intended to strip away the ability of pole and conduit owners to alter the competitive balance through manipulation of the pricing of and access to essential, bottleneck facilities.

Unfortunately, the existing paradigm for the availability of attachments at reasonable rates is imperfect. This is so because

---

50 See 47 U.S.C. § 224(f)(1).

51 See 47 U.S.C. § 224(g).